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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)

Inquiry Concerning High-Speed Access to)
the Internet Over Cable and Other Facilities)
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GN Docket No. 00-185

COMMENTS OF PEGASUS COMMUNICATIONS CORPORATION

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COMMENTS OF PEGASUS COMMUNICATIONS CORPORATION

Pegasus Communications Corporation (“Pegasus”) hereby submits these Comments in response to the Commission’s Notice of Inquiry (“NOI”) in the above-referenced proceeding.¹ Pegasus urges the Commission as it proceeds to keep in mind that “Open Access” is first and foremost about enabling access itself. Wireline broadband access, provided by cable or xDSL, is not currently available to the majority of American consumers. In even the most optimistic projections, it will not be available to tens of millions of American households for years to come, particularly in the rural areas that are the focus of Pegasus’ efforts. Pegasus therefore encourages the Commission to adopt policies that will enable broadband access to all Americans as quickly as possible in a manner that is fiscally responsible and relies predominantly upon the private sector and the free market. In low density areas, those policies should promote wireless and

¹ See *Notice of Inquiry, In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, FCC 00-355, 65 Fed. Reg. 60,441 (Oct. 11, 2000) (“NOI”); see also *Public Notice*, DA 00-2329 (Oct. 12, 2000) (extending filing dates for Comments and Reply Comments until Dec. 1, 2000 and Jan. 10, 2001, respectively).

satellite-delivered services. More specifically, the Commission should act on pending applications and spectrum allocation proceedings involving broadband satellites.

Pegasus urges the Commission to refrain from imposing any Open Access requirement on wireless broadband platforms, since they lack monopoly power. Such a requirement is unnecessary and unjustified and may in fact frustrate the goal of encouraging broadband deployment. Instead, the Commission should focus on preventing exclusive agreements between key content providers and dominant providers of access. This is a key issue for the long-term development of alternative broadband platforms, just as the adoption of such protections was instrumental to the development of DBS as an effective alternative to cable.

Background

Pegasus. Pegasus is one of the fastest growing media companies in the United States. It serves more than 1.3 million Direct Broadcast Satellite ("DBS") subscribers in 41 states and is the largest independent provider of DBS services to rural parts of the United States on the DIRECTV platform. Through the DBS platform, Pegasus by the first quarter of 2001 intends to provide broadband Internet services to its customers. Pegasus also owns and operates six broadcast television stations and programs four other stations under time brokerage agreements. In addition, through its subsidiary, Pegasus Development Corporation, Pegasus is an applicant in the second Ka-band application processing round. *See SAT-LOA-19980403-00025-29.* Through its proposed Ka-band geostationary satellite system, Pegasus intends to provide consumers a range of multimedia services, including broadband Internet access. Pegasus also has pending before the Commission an application to provide terrestrial services in the 12.2-12.7 GHz spectrum. *See PDC Broadband Corporation, Application for Licenses to Provide Terrestrial Services in the 12.2-12.7 GHz Band* (April 18, 2000); *see also Public Notice*, DA 00-

1841 (August 14, 2000). Pegasus intends to use this spectrum for data transmission services, Internet services and multichannel video programming. Accordingly, Pegasus has a direct interest in the outcome of this proceeding.

Satellite Broadband Services. Currently, satellite Internet services are provided on a hybrid platform basis. Downstream data are transmitted via satellite at speeds up to 400 kbps, while upstream data are transmitted via ordinary telephone lines at speeds of no more than 56 kbps. Several satellite Internet providers, including Pegasus, soon plan to offer broadband services on two-way satellite systems, which will allow for upstream and downstream transmissions at significantly higher speeds.²

Notice of Inquiry. The Commission initiated the NOI to explore issues and develop policies regarding the need or appropriateness of regulation of high-speed Internet access. As the Commission noted, cable operators generally require that their Internet customers also subscribe to an affiliated Internet Service Provider (“ISP”) or Online Service Provider. *See NOI*, at ¶10. The Commission in the NOI asks whether the public interest would be served by the imposition of an Open Access requirement on cable systems used to provide broadband transmission of Internet services.³ The Commission also seeks comments on whether any Open

² *See Communications Daily*, at 3 (November 20, 2000) (Pegasus announces plans to roll out satellite broadband services in first quarter of 2001); *see also Communications Daily*, at 4 (November 7, 2000) (Starband Communications introduces high-speed Internet service over two-way satellite system.).

³ Open Access provisions typically call for “providing unaffiliated ISPs with the right to: (i) purchase transmission capability; and (ii) access the customer directly from the incumbent cable operator.” *See NOI*, at ¶27.

Access obligations imposed on cable system operators should be imposed on other high-speed transmission providers, such as satellite and fixed wireless service providers.⁴ Further, as preliminary matters, the Commission requests comments on its authority to impose Open Access and the technical feasibility of such a requirement.

Discussion

Thus far, the Commission has taken a “hands off” policy with respect to broadband Internet services provided by cable operators. The Commission’s regulatory forbearance in this area has been premised on the belief that “multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers.”⁵ As the Commission notes, ultimately, it will be competition from alternative last-mile transmission providers that will spur technological advancements and provide advanced telecommunication capability, including broadband Internet service, to American consumers.⁶ As a result, the Commission’s goal should be foremost to encourage the deployment of alternative methods of broadband transmission. Specifically, the Commission should act on pending broadband satellite applications and spectrum allocation

⁴ See *NOI*, at ¶30. The NOI raises numerous other issues, including the proper definition of “Open Access” and whether Internet services are telecommunication services governed under Title II of the Communications Act. At this time, Pegasus comments only on those issues specifically raised in this filing.

⁵ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, at ¶101 (1999) (“*First 706 Report*”).

⁶ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CS 98-146, FCC 00-290, (August 21, 2000), at ¶246 (“*Second 706 Report*”).

proceedings. The Commission should also refrain from imposing an Open Access requirement on non-dominant, broadband transmission providers. Such a requirement is unnecessary and unjustified because alternative broadband transmission providers lack monopoly power and, thus, the incentive and ability to behave anticompetitively.

The Commission should limit its regulatory role to ensuring that cable system operators do not exert their monopoly power to impede the development of competitors. More precisely, the Commission should prohibit cable operators and their affiliated Internet content providers from engaging in unfair or discriminatory practices that hinder or prevent other broadband transmission providers from offering Internet content services.

**I. THE COMMISSION SHOULD IMPLEMENT POLICIES
ENCOURAGING THE RAPID DEPLOYMENT OF ALTERNATIVE
BROADBAND TECHNOLOGIES**

As the Commission has noted repeatedly, satellite services hold great promise in providing broadband Internet services to rural consumers. For example, in the Commission's recent Building Access Order, the Commission recognized the growing importance of both fixed wireless and satellite services by extending the rights of tenants and building owners to install and maintain antennas used for the reception or transmission of wireless signals.⁷ Some analysts predict that by 2004, residential subscription to broadband satellite services will reach 4.6

⁷ See generally *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, CC Docket No. 88-57, FCC 00-366 (October 25, 2000) ("*Building Access Order*"); see also *Second 706 Report*, at ¶56 ("[S]atellite-based last mile facilities may provide consumers and small businesses in geographically remote and sparsely populated areas with access to high-speed services that would not otherwise be available.")

million. *See Second 706 Report*, at ¶202. Such growth, however, is contingent on the Commission fulfilling its obligations to conclude expeditiously other proceedings having a direct impact on the deployment of satellite services.

For instance, the Commission needs to take more aggressive steps to ensure the full and prompt utilization of the Ka-band spectrum.⁸ At present, second-round applicants, such as Pegasus, stand willing and able to begin construction and deployment of systems but are idle because of the Commission's unwillingness to act expeditiously in the grant of licenses. Such delay may ultimately prove detrimental to the timely deployment of advanced telecommunications capability, including broadband Internet services, to American consumers.⁹

The Commission should also act promptly in establishing Broadcast Satellite Service ("BSS") rules for the 18 GHz band. The Commission's recent June 22, 2000 order postponed establishing any service rules, because the implementation date allocating the 17.3 - 17.7 GHz band to BSS was set for April 1, 2007.¹⁰ However, because BSS licensees must realistically

⁸ Pegasus, with several other second-round applicants, has recently submitted a joint proposal, which, if accepted, would immediately resolve the outstanding licensing issues and expedite the deployment of satellite services. *See Letter from James U. Troup, Counsel for CAI Data Systems, Inc., David D. Oxenford, Counsel for Pegasus Development Corporation, and Todd M. Stansbury, Counsel for DirectCom Networks, Inc. to Magalie Roman Salas, Secretary, FCC*, at 2 (August 11, 2000).

⁹ The Commission also needs to act promptly in order to meet ITU deadlines. *See Third Report and Order, Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, 12 FCC Rcd 22310, at ¶61 n.77 (1997).

¹⁰ *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of*

Footnote continued on next page

begin construction of spacecraft by 2004 in order to deploy service timely, the Commission only has a short time by which to open a notice and comment period, evaluate proposals, initiate a filing window and process applications.

II. THE COMMISSION SHOULD NOT IMPOSE AN OPEN ACCESS CONDITION ON NON-DOMINANT, BROADBAND TRANSMISSION PROVIDERS

The call for Open Access is premised largely on the concerns that cable operators, as the dominant provider of broadband Internet services in most areas, will be able to control broadband Internet access and content, and anticompetitively foreclose markets to competing ISPs. For example, the Department of Justice stated in its assessment of the AT&T and MediaOne merger that “[b]y exploiting its “gatekeeper” position in the residential broadband content market [cable operators] could make it less profitable for disfavored content providers to invest in the creation of attraction broadband content, and reduce competition and restrict output in that market.”¹¹ Such concerns are unwarranted in the context of fixed wireless and satellite broadband transmission providers who lack monopoly power and are unable to behave in an anticompetitive manner.

Footnote continued from previous page

Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, FCC 00-212, 2000 FCC LEXIS 3200 (June 22, 2000).

¹¹ See *Proposed Final Judgment and Competitive Impact Statement, United States v. AT&T Corp. and MediaOne Group, Inc.*, 65 FR 8584 (June 21, 2000); see also, *Petition to Deny of Consumers Union, Consumer Federation of America, and Office of Communications, Inc. of the United Church of Christ*, CS Docket 98-178 (filed October 29, 1998).

At present, fixed wireless and satellite service providers combined serve only 6% of all residential and small business broadband subscribers.¹² In contrast, cable systems provide service to 78% of that market.¹³ Because imposing an Open Access condition on non-dominant broadband service providers redresses no anticompetitive harms, the Commission has no justification for imposing Open Access on satellite or fixed wireless operators.¹⁴

Moreover, federal law expressly provides the Commission only the authority to impose obligations on DBS operators to comply with political broadcasting rules and to set aside channel capacity for noncommercial, educational or informational programming.¹⁵ The Act does not otherwise permit the Commission to impose common carrier type regulations on DBS licensees.¹⁶

Additionally, to the extent the Commission concludes that the provision of broadband Internet services subjects satellite or fixed wireless operators to common carrier regulations, it has broad authority to forbear from enforcing these obligations if it determines that such action is

¹² See *Second 706 Report*, at ¶71. Moreover, unlike cable modem services, the Commission does not even consider Internet satellite services in its present hybrid form to be advanced services. *Id.* at ¶111.

¹³ See *Second 706 Report*, at ¶71. Local exchange carriers using asymmetric DSL provide service to the remaining 16% of that market. *Id.*

¹⁴ This reasoning is consistent with the Commission's past conclusion not to impose "cable-related" obligations on DBS operators "[b]ecause of the disparity in market power between DBS providers and cable operators." *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*; 13 FCC Rcd 23254, ¶60 (November 25, 1998)

¹⁵ See 47 U.S.C. §335; see also *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*; 13 FCC Rcd 23254, ¶¶56-61 (November 25, 1998).

¹⁶ See generally, 47 U.S.C. §§151 *et seq.*; 47 U.S.C. §§301 *et seq.*

unnecessary to prevent discrimination or to protect consumers, is consistent with the public interest, and will enhance competition.¹⁷ Such forbearance is warranted here, where Open Access obligations might hinder the development of satellite or fixed wireless services as viable competitors to cable services.

III. THE COMMISSION SHOULD ENSURE THAT INCUMBENT CABLE OPERATORS ARE UNABLE TO RESTRAIN THE DEVELOPMENT OF ALTERNATIVE BROADBAND SERVICE PROVIDERS

Although the focus of the NOI is on the ability of cable system operators to foreclose markets to non-affiliated ISPs, the Commission should also be equally concerned with the ability of monopoly wireline broadband system operators to use their power over Internet content providers to foreclose markets to alternative broadband service providers.¹⁸ For instance, cable operators might require Internet content providers to enter into exclusive arrangements thereby denying competing broadband transmission systems access to those content networks. Similarly, cable-affiliated Internet content providers may deny alternative broadband providers access to their content network. To the extent customers prefer those Internet content providers, these exclusive arrangements will deter the development of alternative broadband transmission systems.

These competitive concerns are analogous to those raised by the satellite industry in the 1980's with respect to video programming and eventually gave rise to the 1992 Cable Act

¹⁷ See 47 U.S.C. §160.

¹⁸ A similar analysis would apply to other broadband transmission providers, such as local exchange carriers, with monopoly power.

prohibitions on anticompetitive restrictions on the distribution of video programming. *See* 47 U.S.C. §548. Specifically, the Act prohibits “unfair methods of competition” in the sale of video programming intended for cable and satellite broadcasting. 47 U.S.C. §548(b). The Commission’s rules expressly bar exclusive arrangements between cable operators and programming or broadcasting vendors which prohibit other multichannel video providers from obtaining video programming. *See* 47 C.F.R. §76.1002(c). These anticompetitive restrictions are intended to “increas[e] competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming ... and to spur the development of communications technologies.” *Id.* at §548(a). Such goals are also fully applicable in the context of broadband services. Accordingly, the Commission should consider limitations on the ability of monopoly broadband system operators and their affiliated content providers to engage in unfair or discriminatory practices which hinder or prevent competing broadband providers from offering Internet content services.

Conclusion

For the aforementioned reasons, Pegasus Communications Corporation requests that the Commission take action promoting the deployment of wireless broadband transmission systems, refrain from imposing Open Access requirements on non-dominant, broadband transmission systems, and ensure that dominant, broadband service providers do not use their monopoly power over last-mile broadband transmission facilities to thwart the competitive entry of alternative transmission providers.

Respectfully submitted,

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Dated: December 1, 2000

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